

CHAPTER II

APPOINTMENT AND PAYMENT OF COUNSEL

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CHAPTER II. APPOINTMENT AND PAYMENT OF COUNSEL

Part A. Eligibility for Representation Under the Act

2.01 District Plans

A. Each district court, with the approval of the judicial council, is required to have a plan for furnishing representation for any person financially unable to obtain adequate representation. A copy of a "Model Criminal Justice Act Plan" is included as Appendix G.

- (1) Representation shall be provided for any financially eligible person who:
 - (i) is charged with a felony or with a Class A misdemeanor;
 - (ii) is a juvenile alleged to have committed an act of juvenile delinquency as defined in section 5031 of title 18, U.S.C. (see 18 U.S.C. § 5034 with regard to appointment of counsel; for appointment of a guardian ad litem, see paragraph 3.14);
 - (iii) is charged with a violation of probation;
 - (iv) is under arrest, when such representation is required by law;
 - (v) is entitled to appointment of counsel in parole proceedings; [The reference to representation at parole proceedings was deleted from the Criminal Justice Act in accordance with the November 1, 1987 repeal of chapter 311 of title 18 United States Code. However, the savings provisions of the Sentencing Reform Act of 1984, as amended by the Parole Commission Phaseout Act of 1996, state that existing law pertaining to parole will remain effective for fifteen years after November 1, 1987, with regard to persons specified in the savings provisions, and certain laws relating to parole will remain effective until the expiration of the sentence received by other persons specified in the savings provisions. This includes laws governing the right to counsel in parole proceedings.];
 - (vi) is charged with a violation of supervised release or faces modification, reduction, or enlargement of a condition, or extension or revocation of a term of supervised release (see, e.g., *Criminal Monetary Penalties: A Guide to the Probation Officer's Role*, Monograph 114, Chap. VI);
 - (vii) is subject to a mental condition hearing under chapter 313 of title

18, U.S.C. (see paragraphs 2.13 F and 2.22 B(2)(vi)(f), and Appendix H);

- (viii) is in custody as a material witness;
 - (ix) is entitled to appointment of counsel under the sixth amendment to the Constitution, or faces loss of liberty in a case and federal law requires the appointment of counsel. This provision obviates the need for future amendments to the Criminal Justice Act each time the right to counsel may be extended to new situations by judicial decision or federal statutes. It also eliminates any doubt as to the application of the Act with respect to appointment of counsel for patients pursuant to title III of the Narcotic Addict Rehabilitation Act of 1966 (Ch. 2, title 42, U.S.C.) or for juveniles pursuant to the Federal Juvenile Delinquency Act (Ch. 403, title 18, U.S.C.);
 - (x) is seeking to set aside or vacate a death sentence in proceedings under section 2254 or 2255 of title 28, U.S.C.; and
 - (xi) is entitled to appointment of counsel in connection with prisoner transfer proceedings under section 4109 of title 18, U.S.C.
- (2) Whenever the United States magistrate judge or the court determines that the interests of justice so require, representation may be provided for any financially eligible person who:
- (i) is charged with a petty offense (Class B or C misdemeanor, or an infraction) for which a sentence to confinement is authorized; or
 - (ii) is seeking relief under section 2241, 2254, or 2255 of title 28 (but see paragraph 2.01 A(1)(x) regarding the mandatory appointment of counsel in death penalty habeas corpus cases and paragraph 2.14 regarding the requirement for appointment of counsel for an evidentiary hearing).

B. Each plan shall include a provision for private attorneys. The plan may include, in addition to a provision for private attorneys in a substantial proportion of cases, either of the following or both:

- (1) attorneys furnished by a bar association or a legal aid agency; or
- (2) attorneys furnished by a defender organization established in accordance with the provisions of subsection (g) of the Act.

C. Each plan should contain a provision to the effect:

"If at any time after appointment, counsel obtains information that a client is financially able to make payment, in whole or in part, for legal or other services in connection with his or her representation, and the source of the attorney's information is not protected as a privileged communication, counsel shall advise the court."

D. Composition and Management of the Panel of Private Attorneys (CJA Panel). The CJA Panel must be designated or approved by the court. The membership of the panel should be large enough to provide a sufficient number of experienced attorneys to handle the CJA caseload, yet small enough so that panel members receive an adequate number of appointments to maintain their proficiency in criminal defense work and thereby provide a high quality of representation. Members should serve at the pleasure of the court.

Subsection (b) of the Act provides, in part, that:

Counsel furnishing representation under the plan shall be selected from a panel of attorneys designated or approved by the court, or from a bar association, legal aid agency, or defender organization furnishing representation pursuant to the plan.

However, when the district judge presiding over the case, or the chief judge if a district judge has not yet been assigned to the case, determines that the appointment of an attorney, who is not a member of the CJA panel, is in the interest of justice, judicial economy or continuity of representation, or there is some other compelling circumstance warranting his or her appointment, the attorney may be admitted to the CJA panel *pro hac vice* and appointed to represent the CJA defendant. Consideration for preserving the integrity of the panel selection process suggests that such appointments should be made only in exceptional circumstances. Further, the attorney, who may or may not maintain an office in the district, should possess such qualities as would qualify him or her for admission to the district's CJA panel in the ordinary course of panel selection.

Administration and management of the CJA Panel should be centralized in one organizational element (such as the Clerk's Office or, where appropriate, the Federal Defender Organization) to ensure that counsel is appointed as expeditiously as possible, appointments are equitably distributed, and information on availability of counsel is maintained.

Appointments should be made in a manner which results in both a balanced distribution of appointments and compensation among members of the CJA Panel, and quality representation for each CJA defendant. These objectives can be accomplished by making appointments on a rotational basis, subject to the court's discretion to make exceptions due to the nature and complexity of the case, an attorney's experience, and geographical considerations.

A copy of a "Model Plan for the Composition, Administration, and Management of the Panel of Private Attorneys under the Criminal Justice Act" is included as an appendix to the "Model Criminal Justice Act Plan" in Appendix G, at page G-12.

- E. Cases or proceedings which are not covered by or compensable under the Act include the following:
- (1) Petty offenses (Class B or C misdemeanors or infractions), except where confinement is authorized by statute and the judge or magistrate determines that appointment of counsel is required in the interest of justice;
 - (2) Corporate defendant cases;
 - (3) Prisoners bringing civil rights actions under 42 U.S.C. § 1983. Care should be taken to ensure that a prisoner is not denied the appointment of counsel due to the mislabeling of his action as "civil rights" when the proceedings could also be considered as seeking relief under 28 U.S.C. § 2254;
 - (4) Civil actions to protect federal jurors' employment. The appointment and compensation of attorneys in such actions are under the authority of 28 U.S.C. § 1875, not 18 U.S.C. § 3006A;
 - (5) Administrative deportation proceedings before the Immigration and Naturalization Service.

F. Other cases or proceedings which may be covered or compensable under the Act include, but are not limited to the following (see also paragraph 2.22 B(2)):

- (1) Counsel may be appointed under the Act for a person charged with civil or criminal contempt who faces loss of liberty.
- (2) Upon application of a witness before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, counsel may be appointed where there is reason to believe, either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty.
- (3) Counsel may be appointed for financially eligible persons proposed by the U.S. Attorney for processing under a "pretrial diversion" program.
- (4) Counsel may be appointed for persons held for international extradition under chapter 209, title 18, United States Code.
- (5) Representation may be furnished for financially eligible persons in "ancillary matters appropriate to the proceedings" pursuant to subsection (c) of the Act.

In determining whether a matter is ancillary to the proceedings, the court should consider whether the matter, or the issues of law or fact in the matter, arose from, or are the same as or closely related to, the facts and circumstances surrounding the principal criminal charge.

In determining whether representation in an ancillary matter is appropriate to the proceedings, the court should consider whether such representation is reasonably necessary to accomplish, *inter alia*, one of the following objectives:

- (i) to protect a Constitutional right;
- (ii) to contribute in some significant way to the defense of the principal criminal charge;

- (iii) to aid in preparation for the trial or disposition of the principal criminal charge;
- (iv) to enforce the terms of a plea agreement in the principal criminal charge;
- (v) to preserve the claim of the CJA client to an interest in real or personal property subject to a civil forfeiture proceeding pursuant to 21 U.S.C. §881, 19 U.S.C. §1602 or similar statutes, which property, if recovered by the CJA client, may be considered for reimbursement under subsection (f) of the Act and paragraph 2.04 of these Guidelines; or
- (vi) to effectuate the return of real or personal property belonging to the CJA client which may be subject to a motion for return of property pursuant to Fed. R. Crim. P. 41(e), which property, if recovered by the CJA client, may be considered for reimbursement under subsection (f) of the Act and paragraph 2.04 of these Guidelines.

The scope of representation in the ancillary matter should extend only to the part of the ancillary matter that relates to the principal criminal charge and to the correlative objective sought to be achieved in providing the representation (e.g., a CJA defendant in a criminal stock fraud case should be represented by CJA counsel at the defendant's deposition in a parallel civil fraud action for the limited purpose of advising him concerning his Fifth Amendment rights.)

Representation in an ancillary matter shall be compensable as part of the representation in the principal matter for which counsel has been appointed and shall not be considered a separate appointment for which a separate compensation maximum would be applicable under paragraph 2.22 B of these Guidelines. A private panel attorney appointed under the Act may obtain, through an *ex parte* application to the court, a preliminary determination that the representation to be provided in an ancillary matter is appropriate to the principal criminal proceeding and compensable under subsection (c) of the Act and this guideline. However, failure to obtain such a preliminary determination shall not bar the court from approving compensation for representation in an ancillary matter provided that the services and compensation related thereto are justified in a memorandum submitted by the attorney to the court at the conclusion of the principal criminal matter and the presiding judicial officer finds that such representation was appropriate.

- (6) Under 18 U.S.C. § 983(b)(1), if a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of title 18, United States Code, in connection with a related criminal case, the court may authorize counsel to represent that person with respect to the claim.

In determining whether to authorize counsel to represent a person in a judicial civil forfeiture proceeding under a civil forfeiture statute, the court shall take into account such factors as:

- (i) the person's standing to contest the forfeiture; and
- (ii) whether the claim appears to be made in good faith.

2.02 Criminal Justice Act Forms. The Judicial Conference of the United States, at its meeting in January 1965, approved the recommendation of its Committee to Implement the Criminal Justice Act of 1964, that every district incorporate in its plan a requirement that the standard forms, approved by the Conference, be used. (Copies of the pertinent forms are included in Appendix A.)

2.03 Fact-finding

- A. A person financially eligible for representation should be provided with counsel as soon as feasible after being taken into custody, when first appearing before a federal judge or magistrate, when formally charged, or when otherwise entitled to counsel under the Act, whichever occurs earliest. The determination of eligibility for representation under the Criminal Justice Act is a judicial function to be performed by a federal judge or magistrate after making appropriate inquiries concerning the person's financial condition.
- B. Unless it will result in undue delay, factfinding concerning the person's eligibility for appointment of counsel should be completed prior to the person's first appearance in court. Other officers or employees of the court (i.e., clerk, deputy clerk, or Pretrial Services Officer) may be designated by the court to obtain or verify the facts upon which such determination is to be made. Relevant information bearing on the person's financial eligibility should be reflected on CJA Form 23 and the form shall be completed and executed before a judicial officer or employee. Employees of law enforcement agencies or United States attorney offices should not participate in the completion of the CJA Form 23 or seek to obtain information from a person requesting the appointment of counsel concerning his or her eligibility.

- C. The person seeking appointment of counsel has the responsibility of providing the court with sufficient and accurate information upon which the court can make an eligibility determination. The prosecution and other interested entities may present to the court information concerning the person's eligibility, but the judicial inquiry into financial eligibility shall not be utilized as a forum to discover whether the person has assets subject to forfeiture, or the ability to pay a fine, make restitution, or compensate another person pursuant to the Victim/Witness Protection Act or other purposes not related to the appointment of counsel. Such determinations, if appropriate, shall be made at other stages of the proceedings in which the person seeking counsel is a party.

- 2.04 Standards for Eligibility. A person is "financially unable to obtain counsel" within the meaning of subsection (b) of the Act if his net financial resources and income are insufficient to enable him to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to (a) the cost of providing the person and his dependents with the necessities of life, and (b) the cost of the defendant's bail bond if financial conditions are imposed, or the amount of the case deposit defendant is required to make to secure his release on bond.

Any doubts as to a person's eligibility should be resolved in his favor; erroneous determinations of eligibility may be corrected at a later time. At the time of determining eligibility, the judge or magistrate should inform the person of the penalties for making a false statement, and of his obligation to inform the court and his attorney of any change in his financial status. Prior to sentencing, the court should consider pertinent information contained in the presentence report, the court's intention with respect to fines and restitution, and all other available data bearing on the individual's financial condition in order to make a final determination concerning whether the individual then has funds available to pay for some or all of the costs of representation. At the time of sentencing, in appropriate circumstances, it should order the individual to reimburse the CJA appropriation for such costs. (See paragraph 2.22 E). Future earnings should not be considered or subject to a reimbursement order, however, other income or after-acquired assets which will be received within one hundred eighty days after the date of the court's reimbursement order may be available as a source of reimbursement.

- 2.05 Partial Eligibility. If a person's net financial resources and income anticipated prior to trial are in excess of the amount needed to provide him and his dependents with the necessities of life and to provide the defendant's release on bond, but are insufficient to pay fully for retained counsel, the judicial officer should find the person eligible for the appointment of counsel under the Act and should direct him to pay the available excess funds to the Clerk of the Court at the time of such appointment or from time to time thereafter. Such funds shall be held subject to the provisions of subsection (f). The judicial officer may increase or decrease the amount of such payments, and impose such other conditions from time to time as may be appropriate. With respect to the disposition of such funds, refer to paragraph 2.22 E of these Guidelines.

- 2.06 Family Resources. The initial determination of eligibility should be made without regard

to the financial ability of the person's family unless his family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person's spouse (or parents, if he is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement.

Part B. Appointment of Counsel

2.10 Appointment of Counsel to Represent More Than One Individual in a Particular Case. Unless good cause is shown or in the absence of a waiver on the record by the defendants, in a criminal prosecution involving more than one defendant, or where separate charges arising out of the same or similar transactions are concurrently pending against two or more defendants, separate counsel should normally be appointed for each defendant. If an attorney is appointed to represent more than one person, a separate order of appointment shall be entered with respect to each person. An attorney who represents joint defendants may be compensated for his services up to the statutory maximum for each person represented, unless the case involves extended or complex representation (see paragraph 2.24 of these Guidelines).

2.11 Compensation of Co-counsel.

A. Without appointment. Unless appointed in accordance with paragraphs 2.11 B or 6.01 A, co-counsel or associate attorneys may not be compensated under the Act. However, an appointed counsel may claim compensation for services furnished by a partner or associate or, with prior authorization by the court, counsel who is not a partner or associate, within the maximum compensation allowed by the Act, separately identifying the provider of each service.

B. With appointment. In an extremely difficult case where the court finds it in the interest of justice to appoint an additional attorney, each attorney is eligible to receive the maximum compensation allowable under the Act. The finding of the court that the appointment of an additional attorney in a difficult case was necessary and in the interest of justice shall appear on the Order of Appointment. (See paragraph 6.01 A for appointment of more than one attorney in capital cases.)

2.12 Continuity of Representation. If the attorney appointed by the United States magistrate judge is to continue to represent the defendant in the district court, no

additional appointment by the district court should be made, except on appeal from a judgment rendered by the magistrate judge in a misdemeanor case.

An order extending Appointment on Appeal (CJA 20) should be executed for each appellant for whom counsel was appointed by a United States district judge or magistrate judge for representation at the trial level. In a federal capital prosecution, or a proceeding pursuant to 28 U.S.C. § 2254 or 2255 challenging a death sentence, the appointment should be made on a CJA 30.

Absent special circumstances, whenever a case is transferred to another district, such as under Rules 20, 21, and 40, Federal Rules of Criminal Procedure, appointment of counsel should be made in the transferee district.

2.13 Other Appointments. A new appointment on CJA Form 20 should be made for each person represented in the following proceedings:

- A. New trial after motion, mistrial, reversal, or remand on appeal;
- B. Probation revocation proceedings;
- C. Appeal, including interlocutory appeals;
- D. Bail appeals to a Court of Appeals;
- E. Extraordinary writs;
- F. Mental condition hearings pursuant to section 4243 (Hospitalization of a Person Found Not Guilty only by Reason of Insanity), 4245 (Hospitalization of an Imprisoned Person Suffering From Mental Disease or Defect), and 4246 (Hospitalization of a Person Due for Release but Suffering From Mental Disease or Defect) of title 18, United States Code. (See also paragraph 2.22 B(2)(vi)(f) and Appendix H infra.)

2.14 Appointment of Counsel in Habeas Corpus and Proceedings under Section 2255, Title 28, United States Code. While the Rules for sections 2254 and 2255 of title 28, United States Code, mention the appointment of counsel only with regard to discovery and evidentiary hearings, the Criminal Justice Act, subsection (a)(2)(B), permits discretionary appointment at any stage of the proceedings, in the interest of justice. (See paragraph 2.01 A(2)(ii)). In addition, 21 U.S.C. §848(q)(4) requires the appointment of one or more attorneys in death penalty federal habeas corpus cases. (See paragraph 6.01 A.)

- 2.15 Forms for the Appointment of Counsel. Forms for the Appointment of Counsel, together with instructions for the execution and distribution thereof, are included in Appendix A.
- 2.16 Waiver of Counsel. A waiver of assigned counsel by a defendant should be in writing. If the defendant refuses to sign the waiver, the judge or magistrate should certify thereto. No standard form has been prescribed for this purpose. If an appointment of counsel has been made previously, the CJA appointment form and the waiver should be forwarded to the Administrative Office.
- 2.17 Standby Counsel. Criminal defendants have both a constitutional and statutory right to self-representation in federal court. [See Faretta v. California, 422 U.S. 806 (1975); 28 U.S.C. §1654]. In some cases, however, the judge or magistrate may find it necessary to appoint "standby" counsel to be available to assist a *pro se* defendant in his or her defense and also to protect the integrity and ensure the continuity of the judicial proceedings. [See McKaskle v. Wiggins, 465 U.S. 168 (1984); Faretta, *supra*]. The CJA, however, provides that "[u]nless the (financially eligible) person waives representation by counsel... [the court] shall appoint counsel to represent him." While the court has inherent authority to appoint standby counsel, such appointments may not be made and counsel may not be compensated under the CJA unless the defendant qualifies for appointed counsel and representation is actually rendered by counsel. Accordingly, if a financially eligible *pro se* defendant agrees to be represented, at least in part, by standby counsel, compensation may be provided under the CJA. Similarly, if at any time during the course of the proceedings the services of standby counsel are accepted by a financially eligible *pro se* defendant, a *nunc pro tunc* CJA appointment order should be effected and counsel may be compensated under the CJA.

On the other hand, in circumstances in which appointment is made under the court's inherent authority, and counsel serves exclusively on behalf of the court to protect the integrity and continuity of the proceedings, and does not represent the defendant, any compensation to be paid counsel shall be in the capacity of an "expert or consultant" pursuant to 5 U.S.C. §3109. Accordingly, an appointment pursuant to this section may be made regardless of whether the defendant is financially able to obtain adequate representation. In such cases, compensation will be determined by the judicial officer in accordance with CJA hourly rates and case compensation maximums. The Defender Services Division of the Administrative Office should be consulted regarding appointment and payment procedures. If, during the course of the proceedings, a *pro se* defendant who is financially able to retain counsel elects to do so, the court's appointment of an attorney pursuant to §3109 shall be terminated.

- 2.18 Termination of Appointment. In any case in which appointment of counsel has been made and the court subsequently finds that the person is financially able to obtain counsel, such appointment should be terminated. (Use CJA Form 7, Appendix A.)

- 2.19 Federal Defender Organizations. When cases are assigned to a Federal Public or Community Defender Organization, the appointment should be made in the name of the Organization (i.e., the Federal Public Defender or Community Defender), rather than in the name of an individual staff attorney within the Organization. (see paragraph 4.04 of these Guidelines).

Part C. Compensation and Expenses of Appointed Counsel

- 2.20 Forms to be Used. Forms for the compensation and reimbursement of expenses to appointed counsel, together with instructions for the execution and distribution thereof, are included in Appendix A. A copy of all supporting documents which itemize or expand the amounts shown on the face of CJA Form 20 must be attached to at least copies numbered 1 and 2.

2.21 Time Limits.

- A. Vouchers shall be submitted no later than 45 days after the final disposition of the case, unless good cause is shown. The clerks of the concerned courts should ensure that attorneys are complying with the prescribed limits. Every effort should be made to have counsel submit the claim as soon as possible upon completion of services rendered.
- B. Absent extraordinary circumstances, judges should act upon panel attorney compensation claims within 30 days of submission.

2.22 Limitations.

A. Hourly Rates.

- (1) In General. Except in federal capital prosecutions and in death penalty federal habeas corpus proceedings, compensation paid to appointed counsel may not exceed \$60 per hour for time expended in court or before a United States magistrate and \$40 per hour for time reasonably expended out of court, unless the Judicial Conference determines that higher maximum rates not to exceed \$75 per hour are justified for particular places of holding court. (See paragraph 6.02 A regarding compensation of counsel in federal capital cases and death penalty federal habeas corpus proceedings and paragraphs 2.22 A(2) and (3) regarding adjustment of hourly rates.)
- (2) Establishment of Alternative Hourly Rates for Particular Districts or Circuits.
 - (a) Judicial Conference Authority. Subsection (d)(1) of the Act, as

amended by the CJA Revision of 1986, authorizes the Judicial Conference to establish higher maximum hourly rates not to exceed \$75, for particular districts or circuits.

The "alternative" rate provision is intended to be utilized by the Judicial Conference if it determines that circumstances existing in particular districts or circuits warrant an exception from the general hourly maximums of \$60 per hour for in-court time and \$40 per hour for out-of-court time.

To ensure the reasonable exercise of the Judicial Conference's alternative rate setting authority, Congress directed that the Conference develop guidelines for determining the rates.

(b) General Considerations.

- (i) In setting the higher maximum rates, the Judicial Conference may retain or eliminate the in-court/out-of-court hourly rate differential.
- (ii) With respect to representation before the court of appeal, the attorney compensation should be determined based on the higher rate of the maximum hourly rates for the district in which a lawyer maintains his or her principal office or for the district out of which the case arose.

(c) Factors to be Considered in Setting Alternative Rates. In determining whether higher rates are justified, and if so, what such rates shall be, the Judicial Conference may consider the following:

- (1) The minimum range of the prevailing hourly rates for qualified attorneys in the particular district or circuit. In determining the minimum range, the following may be taken into consideration: Any surveys that have been conducted by state and local bar associations, management consulting firms, federal, state and local government agencies, or other organizations regarding hourly rates for in-court and out-of-court time and per diem charges for representation in trial charged by qualified criminal defense lawyers in the relevant area.
- (ii) Overhead costs incurred by criminal practitioners in the area for which an increase is sought including data regarding the average costs for secretarial and clerical personnel, and average lease costs.

- (iii) The ability of the court to recruit and retain qualified private attorneys to serve on the court's CJA panel when compensation is limited to the general hourly maximums, including whether and to what degree the locality has experienced a drop in panel membership and the incidence of refusal by panel members to accept appointments.
 - (iv) The recommendations of the judicial councils of the circuits.
- (d) Procedures. The Judicial Conference has established the following procedures to be followed in connection with requests for alternative rates:
 - (i) The Defender Services Division of the Administrative Office shall conduct studies of the reasonableness of CJA hourly rates in judicial districts and report its findings to the Judicial Conference Committee on Defender Services. The studies should consider the factors enumerated in paragraph 2.22A(2)(c), as well as any other relevant information. The Defender Services Division shall conduct periodic reevaluations of the CJA rates in districts in which the maximum alternative rates have not been established.
 - (ii) Chief judges of districts or judicial councils of circuits may submit requests and justifications for approval or modification of alternative hourly rates to the Defender Services Division.
 - (iii) The Committee on Defender Services will review the studies of the Defender Services Division and requests from districts and circuit councils, and make recommendations to the Judicial Conference regarding the establishment of alternative rates in particular districts or circuits.
 - (iv) The Judicial Conference will consider the requests and recommendations, and make the final determinations on rate adjustments and amounts.
- (3) Annual Increase in Hourly Rate Maximums. Subsection (d)(1) of the Act, as amended by the CJA Revision of 1986, also authorizes the Judicial Conference to increase annually all hourly rate maximums by an amount not to exceed the federal pay comparability raises given to federal

employees, beginning three years after the Act's March 14, 1987 effective date. Hourly rate maximums, including established alternative rates, will be adjusted automatically each year in accordance with any federal pay comparability adjustment, contingent upon the availability of sufficient funds. The new rates will apply with respect to services performed on or after the effective date.

B. Case Compensation Maximums.

(1) General.

- (i) Applicability and Exclusions. The Federal Courts Improvement Act of 2000, effective November 13, 2000, amended subsection (d)(2) of the CJA to increase the case compensation maximum amounts for attorneys. The new case compensation maximum amounts are indicated in paragraph 2.22 B(2) below. All compensation limits are for each attorney in each case. The case compensation limits are not applicable in federal capital cases and in death penalty federal habeas corpus proceedings. (See paragraph 6.02 A.) As further explained in paragraph 2.22 B(3), the CJA places limitations on the general authority of presiding judicial officers to unilaterally approve attorney compensation. Payments above case compensation limits referred to in subparagraph (2) below may be authorized when certified by the presiding judicial officer and approved by the chief judge of the circuit. The chief judge of the circuit is permitted to delegate this approval authority to another active circuit judge. Presiding judicial officers should certify excess compensation payments to counsel whenever in their judgment the case involves extended or complex representation and the amount certified is necessary to provide fair compensation. (See paragraph 2.22 B(3)). Case compensation limits apply only to attorney fees. There is no limit on the presiding judicial officer's authority to approve the reimbursement of expenses of counsel and the chief judge of the circuit has no role in authorizing the payment of such expenses. (See paragraph 2.27 for an explanation of reimbursable out-of-pocket expenses.)
- (ii) Change in Offense Classification Level. If a case is disposed of at an offense level lower than the offense originally charged, the compensation maximum is determined by the higher offense level.
- (iii) More than One Counsel. In difficult cases in which the court finds it necessary to appoint more than one attorney, the limitations

apply to each attorney.

(2) Specific Proceedings.

(i) Felonies [except federal capital prosecutions].

\$5,200 for trial court level.

\$3,700 for appeal.

(ii) Misdemeanors [including petty offenses (class B or C misdemeanors or infractions) as set forth in subsection (a)(2)(A) of the Act].

\$1,500 for trial court level.

\$3,700 for appeal.

(iii) Proceedings under section 4106A of title 18, United States Code [in connection with paroled prisoners transferred to the United States].

\$1,200 for representation before the United States Parole Commission.

\$3,900 for appeal.

(iv) Proceedings under sections 4107 or 4108 of title 18, United States Code [for counsel and guardians ad litem providing services in connection with prisoner transfer proceedings. See Regulations for the Appointment of Counsel Pursuant to a Prisoner Transfer Treaty, which appears at Section B of this Volume, regarding appointment of counsel or guardians ad litem under 18 U.S.C. §4109].

\$1,500 for each verification proceeding.

(v) Pre-Trial Diversion.

\$5,200 if offense alleged by the U.S. Attorney is a felony.

\$1,500 if offense alleged by the U.S. Attorney is a misdemeanor.

(vi) Proceedings under section 983 of title 18, United States Code [for services provided by counsel appointed under 18 U.S.C. §983(b)(1) in connection with certain judicial civil forfeiture proceedings].

\$5,200 for trial court level.
\$3,700 for appeal.

(vii) Non-capital Post-Conviction Proceedings under sections 2241, 2254 or 2255 of title 18, United States Code.

\$5,200 for trial court level.

\$3,700 for appeal.

(viii) Other Representations required or authorized by the CJA.

\$1,200 for trial court level.

\$1,200 for each level of appeal.

[This category includes but is not limited to the following representations:

(a) Probation Violation;

(b) Supervised Release Hearing [for persons charged with a violation of supervised release or facing modification, reduction or enlargement of a condition or extension or revocation of a term of supervised release];

(c) Parole Proceedings under chapter 311 of title 18, U.S.C.;

(d) Material Witness in Custody;

(e) Mental Condition Hearings Pursuant to chapter 313 of title 18, U.S.C. [with the exception of hearings pursuant to sections 4241 and 4244 of title 18, U.S.C., which are considered part of the case in chief with no separate compensation maximums applying. (A chart detailing the treatment for the purpose of compensation of representation at each hearing pursuant to chapter 313 is included as Appendix H.)];

(f) Civil or Criminal Contempt [Where the person faces loss of liberty];

(g) Witness [before a grand jury, a court, the Congress, or a federal agency or commission which has the power to compel testimony, where there is a reason to believe either prior to or during testimony, that the witness could be subject to a criminal prosecution, a civil or criminal contempt proceeding, or face loss of liberty];

- (h) International Extradition [under chapter 209 of title 18, U.S.C.].
- (ix) Ancillary Matters. Representation in ancillary matters shall be compensable as part of the representation in the principal matter for which counsel has been appointed, and shall not be considered a separate appointment for which a separate compensation maximum would apply.
- (3) Waiving Case Compensation Maximums. Payments in excess of CJA compensation maximums may be made to provide fair compensation in cases involving extended or complex representation when so certified by the court or magistrate and approved by the chief judge of the circuit (or by an active circuit judge to whom excess compensation approval authority has been delegated).

In determining if an excess payment is warranted, the court or magistrate and the chief judge of the circuit (or an active circuit judge to whom excess compensation approval authority has been delegated) should make a threshold determination as to whether the case is either extended or complex. If the legal or factual issues in a case are unusual, thus requiring the expenditure of more time, skill and effort by the lawyer than would normally be required in an average case, the case is "complex." If more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings, the case is "extended."

After establishing that a case is extended or complex, the approving judicial officer should determine if excess payment is necessary to provide fair compensation. The following criteria, among others, may be useful in this regard: responsibilities involved measured by the magnitude and importance of the case; manner in which duties were performed; knowledge, skill, efficiency, professionalism, and judgment required of and used by counsel; nature of counsel's practice and injury thereto; any extraordinary pressure of time or other factors under which services were rendered; and any other circumstances relevant and material to a determination of a fair and reasonable fee.

C. Supporting Memorandum.

- (1) Claim for Less than the Case Compensation Maximum. In any case in which the total compensation claimed is less than the statutory case compensation maximum, counsel may be required to submit a memorandum supporting and justifying the compensation claimed, whenever called for by local rule, standing order, or by the presiding judicial officer.

- (2) Claim for More than the Case Compensation Maximum. In any case in which the total compensation claimed is in excess of the statutory case compensation maximum, counsel shall submit with the voucher a detailed memorandum supporting and justifying counsel's claim that the representation given was in an extended or complex case, and that the excess payment is necessary to provide fair compensation. Upon preliminary approval of such claim by the presiding judicial officer, the court should furnish to the chief judge of the circuit a memorandum containing its recommendation and a detailed statement of reasons.
- D. Reduction of CJA Compensation Vouchers by the Reviewing Judicial Officer. The Criminal Justice Act provides that the reviewing judicial officer shall fix the compensation and reimbursement to be paid to appointed counsel. In cases where the amount approved is less than was requested by appointed counsel, the judicial officer may wish to notify appointed counsel that his or her claim for compensation and/or reimbursement has been reduced, and to provide an explanation of the reasons for the reduction.
- E. Payments by a Defendant Under Subsection (f) of the Act. No appointed attorney shall accept a payment from or on behalf of the person represented without authorization by a United States district or circuit judge or magistrate on CJA Form 7. If such payment is authorized, it shall be deducted from the fee to be approved by the court under subsection (d) of the Act. In this regard, the combined payment to any one attorney for compensation from both the person represented and the government shall be subject to applicable dollar limitations, unless excess compensation is approved under subsection (d)(3) of the Act. Whenever the court finds that funds are available for payment from or on behalf of a person represented and directs that such funds be paid to the court for deposit in the Treasury, payment should be made by a check or money order drawn to the order of the clerk of court, who will deposit all monies received to the credit of the Treasury and credit such sums to the CJA appropriation. Subsection (f) of the Act does not authorize a judicial officer to require reimbursement as a condition of probation, and the Judicial Conference believes that reimbursement of the cost of representation under the Act should not be made a condition of probation under any other authority.
- F. Services Before United States Magistrate Judges. Magistrate judges may only approve vouchers for services rendered in connection with a case disposed of entirely before the magistrate judge.

2.23 Prior Authorization by Court to Counsel to Incur Expenses. Court plans may require advance authorization for such items as counsel's expenses over stipulated amounts or counsel's travel in excess of stipulated distances. Such advance authorization need not be submitted to the Administrative Office.

2.24 Proration of Claims. When a defendant is charged in one indictment with severable counts, one voucher should be submitted and one maximum applied under subsection (d)(2) of the Act, whether or not the counts are severed for trial. When a defendant is charged in two or more indictments (other than a superseding indictment or information), a separate voucher should be submitted, and a separate maximum applied under subsection (d)(2) of the Act, for each indictment, whether or not the indictments are consolidated for trial.

Where single counsel is appointed to represent multiple defendants, separate vouchers should be submitted, and a separate maximum applied under subsection (d)(2) of the Act, for each defendant represented.

Whenever appointed counsel submit separate vouchers, as provided by this paragraph, time spent in common on more than one indictment or case must be prorated among the indictments or cases on which the time was spent; and each indictment or case must be cross-referenced on the vouchers. Time spent exclusively on any one indictment or case may properly be charged on the voucher for that indictment or case.

2.25 Substitution of Counsel. If an attorney is substituted for an attorney previously appointed for a defendant in the same case, the total compensation which may be paid both attorneys shall not exceed the statutory maximum for one defendant, unless the case involves extended or complex representation. In such cases, vouchers for attorney's services shall not be approved by a judicial officer until the conclusion of the trial so that the judicial officer may make such apportionment between the attorneys as may be just.

2.26 Travel Time. Compensation shall be approved for time spent in necessary and reasonable travel. Ordinarily, allowable time for travel includes only those hours actually spent **in or awaiting transit**. Accordingly, if a trip necessarily and reasonably requires overnight lodging, compensable travel time to the destination from the claimant's office would terminate upon arrival and check-in at the hotel or other place of accommodation plus travel time returning directly to the claimant's office from said destination. Compensation for travel time shall be at a rate not to exceed the rate provided in subsection (d) of the Act for "time reasonably expended out of court."

If such travel is made for purposes in addition to representing the person whom the attorney has been appointed to represent under the Act, the court shall determine whether, in fairness to the appointed attorney, the travel time should be apportioned, and the appointed attorney compensated for that portion of the travel time reasonably

attributable to the performance of the attorney's duties under the Act. In determining whether such travel time should be so apportioned, the court may consider the time reasonably expended in the performance of the attorney's duties under the Act, in relation to the time expended furthering other purposes of the trip, the significance to the representation of the duties performed, and the likelihood that the attorney would have made the trip to perform the duties under the Act in the absence of the other purposes for making the trip.

2.27 Reimbursable Out-of-Pocket Expenses. Out-of-pocket expenses reasonably incurred may be claimed on the voucher, and must be itemized and reasonably documented. Expenses for investigations or other services under subsection (e) of the Act shall not be considered out-of-pocket expenses.

A. Reimbursement for Transcripts.

- (1) Generally, court reporters or reporting services which furnish court authorized transcripts in CJA cases claim and receive compensation for their services on the CJA Form 24, "Authorization and Voucher for Payment of Transcript," (See paragraph 3.12 of these Guidelines). While this is the preferred method for payment of transcripts, if assigned counsel has elected to pay for the court authorized transcripts "out-of-pocket," the cost may be claimed as a reimbursable expense, as provided for in subsection (d)(1) of the Criminal Justice Act. However, unlike most reimbursable expenses, which should be claimed on the CJA Form 20, "Appointment of and Authority to Pay Court Appointed Counsel," reimbursement to the attorney who has paid for the transcript as an "out-of-pocket" expense should be claimed on a CJA Form 24. (See Appendix A).
- (2) The cost of transcribing depositions in criminal cases is the responsibility of the Department of Justice pursuant to Rule 17b of Fed. R. Crim. P. (but when witness is an expert, then the Administrative Office will pay out of CJA funds)(53 Comp. Gen. 638 (1974)).

B. Travel Expenses. Travel by privately owned automobile should be claimed at the rate currently prescribed for federal judiciary employees who use a private automobile for conduct of official business, plus parking fees, ferry fares, and bridge, road, and tunnel tolls. Transportation other than by privately owned automobile should be claimed on an actual expense basis.

Per diem in lieu of subsistence is not allowable, since the Act provides for reimbursement of expenses actually incurred. Therefore, counsel's expenses for meals and lodging incurred in the representation of the defendant would constitute

reimbursable "out-of-pocket" expenses. In determining whether actual expenses incurred are "reasonable," counsel should be guided by the prevailing limitations placed upon travel and subsistence expenses of federal judiciary employees in accordance with existing government travel regulations.

Government travel rates at substantial reductions from ordinary commercial rates may be available from common carriers for travel authorized by the court in connection with representation under the CJA. To obtain such rates, attorneys must contact the clerk of the court and obtain prior approval from the presiding judicial officer.

- C. Interim Reimbursement for Expenses. Where it is considered necessary and appropriate in a specific case, the presiding judge or magistrate judge may, in consultation with the Administrative Office, arrange for interim reimbursement to counsel of extraordinary and substantial expenses incurred in providing representation in a case. Interim reimbursement should be authorized when counsel's reasonably-incurred, out-of-pocket expenses for duplication of discoverable materials made available by the prosecution exceed \$500.
- D. Other. This would include items such as telephone toll calls, telegrams, copying (except printing -- see paragraph 2.28 D below) and photographs.

2.28 Non-reimbursable Items. Appointed counsel may not claim reimbursement for the following:

- A. General Office Overhead. General office overhead includes general office expenses which would normally be reflected in the fee charged to the client. The statutory fee is intended to include compensation for these general office expenses. Therefore, except in extraordinary circumstances (see paragraph 3.16), personnel, rent, telephone service, and secretarial expenses associated with CJA representation, whether work is performed by counsel or other personnel, are not reimbursable.
- B. Items and Services of Personal Nature. The cost of items of a personal nature purchased for or on behalf of the person represented, such as purchasing new clothing or having clothing cleaned, getting a haircut, furnishing cigarettes, candy or meals, etc. Also, the cost of services of a personal nature and expenses incidental thereto which cannot be considered legal representation, such as assisting the defendant in the disposition of his or her personal property, arranging for the placement of minor children of the defendant, assisting the defendant in executing the conditions of probation, providing legal assistance in matters unrelated to the litigation of the case, although incidental to the defendant's arrest, etc.

- C. Filing Fees. Attorneys should not be required to pay a filing fee in a Criminal Justice Act case inasmuch as such payment and reimbursement thereof is tantamount to the Government billing itself to accomplish a transfer of appropriated funds into the General Fund of the Treasury.
- D. Printing of Briefs. The expense of printing briefs, regardless of the printing method utilized, is not reimbursable; however, the cost of mimeographing, "xeroxing," or similar copying service is reimbursable.
- E. Service of Process. Witness fees, travel costs, and expenses for service of subpoenas on fact witnesses, are not payable out of the CJA appropriation but are governed by Rule 17, Fed. R. Crim. P. and 28 U.S.C. §1825.
- F. Taxes. Taxes paid on attorney compensation received pursuant to CJA, whether based on income, sales or gross receipts, are not reimbursable expenses.

2.29 Writ of Certiorari. Counsel's time and expenses involved in the preparation of a petition for a writ of certiorari are considered as applicable to the case before the United States Court of Appeals, and should be included on the voucher for services performed in that court.

2.30 Interim Payments to Counsel.

- A. Non-Death Penalty Cases. Where it is considered necessary and appropriate in a specific case, the presiding trial judge may arrange for periodic or interim payments to counsel. Appendix E (pages E-1 through E-6) contains instructions on the procedures for effecting interim payments to counsel, as well as a sample memorandum order on this subject which provides for two alternative payment methods. The payment options provided in the order are designed to strike a balance between the interest in relieving court-appointed attorneys of financial hardships in extended and complex cases, and the practical application of the statutorily imposed responsibility of the chief judge of the circuit to provide a meaningful review of claims for excess compensation. Other interim payment arrangements which effectuate this balance may be devised in consultation with the Defender Services Division of the Administrative Office of the United States Courts.
- B. Death Penalty Cases. Presiding judicial officers are urged to permit interim payments in death penalty cases. Since the Anti-Drug Abuse Act of 1988 effectively repealed the CJA hourly rates and case maximums with respect to death penalty cases, a separate set of procedures and a separate memorandum order

should be used in those cases. These procedures and sample memorandum order

are set forth in Appendix E, beginning on page E-7.

2.31 Law Student and Computer Assisted Legal Research

- A. Law Student. In some districts and circuits, arrangements have been made for the use of qualified law students to assist assigned counsel in trial preparation and in drafting briefs and arguments on appeal. Payment under the CJA in such instances may be made to assigned counsel only for compensable time spent by counsel plus allowable expenses. Allowable expenses for the attorney may include compensation paid to law students for legal research, but do not include reimbursement for expenses incurred by a law student in assisting appointed counsel.
- B. Computer Assisted Legal Research. The cost of use, by appointed counsel, of computer assisted legal research equipment, may be allowed as a reimbursable out-of-pocket expense, provided that the total amount approved for computer assisted legal research does not exceed the total amount of attorney compensation that reasonably would have been approved if counsel had performed the research manually. Whenever appointed counsel incurs charges for computer assisted legal research, counsel should attach to the compensation voucher the following:
 - 1) a brief statement setting forth the issue or issues that were the subject matter of the research; and
 - 2) an estimate of the number of hours of attorney-time that would have been required to do the research manually; and
 - 3) a copy of the bill and receipt for the use of the equipment or an explanation of the precise basis of the charge (e.g., indicating the extent to which it was derived by proration of monthly charges, or by charges identifiable to the specific research).

(See paragraph 3.15 concerning claims for compensation for computer assisted legal research services performed by employees of commercial legal research firms or organizations).

- #### 2.32 Record Keeping
- Appointed counsel must maintain contemporaneous time and attendance records for all work performed, including work performed by associates, partners, and support staff, as well as expense records. Such records, which may be subject to audit, must be retained for three years after approval of the final voucher for an appointment.